NO. 85-1814

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ROBERT B. EUBANK,
Petitioner
Individually And On Behalf Of All Other
Shareholders Of Lee Lumber Company, Ltd.

versus

LEE LUMBER COMPANY, LTD.,
Respondent

versus

INTERNATIONAL PAPER COMPANY,
Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT, INTERNATIONAL PAPER COMPANY, IN OPPOSITION TO PETITION FOR CERTIORARI

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28 pp

QUESTIONS PRESENTED FOR REVIEW

1. Question No. 1 proposed for review by Petitioner is not presented by the factual and legal circumstances of this lawsuit, and is inappropriate and inapplicable to any review of the Judgment of the Fifth Circuit Court of Appeals herein.

The "unprescribed cause of action" alluded to by Petitioner in said Question No. 1 refers to a "cause of action" alleged by Petitioner in earlier lawsuits between these same parties, involving this same controversy, as an underlying "cause of action" or basis for Petitioner's claims and demands in said earlier lawsuits. Earlier judgments of the United States District Court for the Western District of Louisiana, affirmed by the Fifth Circuit Court of Appeals, have held this "cause of action", now alluded to herein by Petitioner, to be unavailable to Petitioner in the legal and factual circumstances found in this lawsuit.

2. Question No. 2 proposed by Petitioner for review is not presented by the factual and legal circumstances of this lawsuit, is somewhat misleading and is inappropriate and inapplicable to any review of the Judgment of the Fifth Circuit Court of Appeals herein.

The "affidavits and opinions" of other attorneys and professors of law, submitted by Petitioner to the Fifth Circuit show on their faces to be nothing more than "opinions", and, even so, primarily based upon either a complete misunderstanding of the true factual and legal circumstances involved in the earlier litigation between the parties, or a refusal to recognize same, on the part of individuals furnishing said affidavits and opinions.

The grant of sanctions, in the form of attorneys' fees, against Petitioner by the Fifth Circuit Court of Appeals was

QUESTIONS PRESENTED FOR REVIEW (Continued)

made upon the finding by the Fifth Circuit that this Petitioner has no colorable argument under Louisiana law to support his theory in this lawsuit and that the appeal of the Judgment of the District Court herein to the Fifth Circuit was completely meritless, all based upon its consideration of the record before it and of the established history, factual and legal circumstances of this and earlier lawsuits litigated between these same parties, involving this same controversy.

3. Respondent respectfully shows that no questions whatsoever are presented in this lawsuit, with regard to Rulings and/or Judgments of either the District Court below or the Fifth Circuit Court of Appeals, for review by this Honorable Court. Same are on their face eminently correct.

LIST OF RELATED COMPANIES

In compliance with Rule 28.1, the following List of Related Companies is furnished. International Paper Company is a publicly owned, international corporation and has no parent corporation. Rule 28.1 does not require the listing of wholly-owned subsidiaries.

Name	State or Country of Incorporation	Percentage of Ownership
Anthony Forest Products Co. 309 No. Washington Street El Dorado, AR 71730	Delaware	49%
Arizona Chemical Company 200 South Sudduth Place Panama City, FL 32404	Delaware	90.1%
Calpine Containers, Inc. 1875 Olympic Boulevard Walnut Creek (Contra Costa County), CA 94596	California	31.7%
Calpine Sales, Inc. 1875 Olympic Boulevard Walnut Creek (Contra Costa County), CA 94596	California	32.8%
Corporacion Forestal De Venezuela, C. A. Manufacturas de Papel, C. A. Apartado Postal 2046 Carmelitas, Caracas, Venezuela	Venezuela	49%

RELATED COMPANIES (Continued)

Name	State or Country of Incorporation	Percentage of Ownership
Envases Internacional Caracas, Venezuela Apartado 5849 Carmelitas 101	Venezuela	99.9%
Forest Lines Agencies (UK) Ltd. 4/5 Grosvenor Place London SWIX 7HD, England	England	50%
Indian Lake Dam Holding Corp. 126 State Street Albany, NY 12207	New York	57.9%
International Paper (Far East) Limited 1207 Alexandra House 16-29 Chater Road Hong Kong	Hong Kong	50%
International Paper Company (Europe) Limited Talacker 41 P. O. Box 8029 Zurich, Switzerland	Switzerland	97.5%
International Paper Korea, Ltd. 194-4, Insa-long Chongro-Ku Seoul, Korea	Republic of Korea	92.7%

RELATED COMPANIES (Continued)

Name	State or Country of Incorporation	Percentage of Ownership
International Paper Taiwan Ltd. Cathay min Sheng Chan Kwo Building 4th Floor, Room B 350 Min Sheng East Road Taipei 104, Taiwan Republic of China	Republic of China	99.9%
IP Investments (UK) Limited 4/5 Grosvenor Place London, SWIX 7HD England	Delaware	99.9%
IP Property Company (UK) Limited Road Three, Industrial Estate Winsford, Cheshire, CW7 3RJ, England	Delaware	99.9%
IPI Corporation Juzen Building 9-6, Nagata-cho 2-chone Chiyoda-ku, Tokyo 100 Japan	Japan	51%
IPI S. r. L. Via Manzoni 31, Milan, Italy	Italy	50%

RELATED COMPANIES (Continued)

Name	State or Country of Incorporation	Percentage of Ownership
Mississippi Export Railroad Company P. O. Box 743 Moss Point, MS 39563	Mississippi	40.6%
Productora De Papeles S. A. "PROPAL" Yumbo, Republic of Colombia, South America	Republic of Colombia	25%
Rouviere Corporation Avenida Federico Boyd, No. 33 Panama, Republic of Panama	Republic of Panama	51%
Sicilcartone S. r. l. Via Salemi, 18 Marsala, Italy	Italy	50%
Societe Civille Immobiliere Les Semestres Montcalde 25, Rue Michel Salles 92210 Saint Cloud, France	France	99.9%
Societe Guadeloupeene de Carton Ondule Peres Blancs Bailif Guadeloupe, French West Indies	Republic of France	99.9%

RELATED COMPANIES (Continued)

Name	State or Country of Incorporation	Percentage of Ownership
Societe Mediterraneene D'Emballages 25, Rue Michel Salles 92210 Saint Cloud, France	France	84.6%

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STATEMENT OF THE CASE

The hypothetical scenario with which Petitioner begins his Statement of the Case is quite apparently concocted by Petitioner to provide an erroneous factual and circumstantial framework upon which to attempt to display for this Court his facetious theories and arguments already presented on numerous occasions to the District Court and Fifth Circuit Court of Appeals and even earlier presented to this Court in the earlier action referred to by Petitioner as Lee III. Embedded in this scenario is the fishhook of fallacy. Petitioner's hypothetical presentation is not factually or legally comparable to this lawsuit, nor to the history of the controversy and litigation between these same parties in the earlier lawsuits before the Courts below and before this Court, nor to the present lawsuit and its disposition by the Courts below.

Respondent submits that the best and most authoritative information regarding the factual situation and circumstances giving rise to this protracted litigation and the most concise documentation of the history of this litigation will be found in the Rulings of the District Court below in Lee II, Lee III and Lee IV (Petitioner's Appendix B, pages 1 through 10, Appendix C, pages 1 through 7 and Appendix D, pages 1 through 5).

The Ruling in Lee II finds that the pleadings and exhibits therein establish the facts of said lawsuit beyond dispute. The District Court details the factual situation which it finds to have been established beyond dispute, discusses earlier litigation between the parties in the State Courts of Louisiana, both of original jurisdiction and of appellate jurisdiction, and particularly cites findings of fact, holdings and rulings of the State Courts of Louisiana.

Thereafter the Ruling in Lee II examines and discusses in great detail and at great length the contentions and claims for relief of Plaintiff therein, Lee Lumber Company, Ltd., setting

forth in some detail the Court's analysis of all of the grounds relied upon by Plaintiff therein.

Particularly, the District Court in Lee II specifically covered, discussed and ruled upon, adversely to Lee Lumber Company, Ltd., the very contentions, grounds and claims later made by this Petitioner in Lee III. A brief but careful reading of this Ruling of the District Court below in Lee II will definitively answer in the affirmative the question of whether findings of fact and application of appropriate laws of the State of Louisiana were accomplished by the District Court below in Lee II.

The Ruling of the District Court below in Lee III makes particular reference to its earlier Ruling in Lee II, as well as to earlier stages of litigation between these parties in the Louisiana Courts. This review of the facts and history of the earlier litigation in the Ruling in Lee III prefaced and tied in the actual Ruling of the Court with regard to the allegations and claims of the Complaint of this Petition in Lee III.

A brief but careful reading of this ruling of the District Court below in Lee III clearly reflects the findings of fact and application of appropriate Louisiana law thereto.

The Ruling in the District Court in this lawsuit, Lee IV, again summarizes the past history of the litigation of this same controversy between these same parties and leaves no doubt in the mind of any reader that the District Court found that in Lee IV this Petitioner has again attempted to relitigate the same dispute which has been litigated between these same parties since 1973.

The affirming Judgment of the Fifth Circuit Court of Appeals (Petitioner's Appendix D, pages 8 through 10), itself carefully and concisely reviews the history of the litigation of

this same controversy between these same parties, in both the State and Federal Courts, together with the several Judgments rendered as a result thereof and the individual and cumulative effect of these earlier Judgments.

The Summary Judgments granted by the District Court below in Lee II, Lee III and Lee IV and affirmed by the Fifth Circuit Court of Appeals were clearly Judgments on the merits, resulting from an application by a Court of competent jurisdiction of appropriate statutory, codal and/or case law to undisputed factual situations and/or findings of fact made by the Court.

Petitioner discusses from time to time in his Petition the 1971 decision by the same District Court below in *L. L. Brewton Lumber Co., Inc. v. Continental Can Co., Inc.*, U.S. D.C., W.D. La., No. 14680, 480 F.2d 923 (CA 5 1972). Discussion of this decision will be made at points later herein. Suffice it to say at this point that the Court in that case did not have before it the question of prescription. The application of Louisiana law by the District Court below in that case is in no way analogous to the application made by the Court of Louisiana law in either Lee II, Lee III or Lee IV.

In his Statement of the Case in his Petition to this Court (pages 4-5), Petitioner sets forth two contentions or claims that the Lease Agreement which has been the subject of this protracted litigation between the parties is void. While these contentions or claims can in no way be said to be related to the questions which Petitioner now attempts to present to this Court for review, the earlier final disposition of same should be noted.

The original litigation before the Courts in the State of Louisiana, *Lee Lumber Co., Ltd. v. International Paper Co.*, 321 So.2d 42 (La. App. 1975), cert. den. 324 So.2d 423

(La. 1976), 345 So.2d 212 (La. App. 1977), cert. den. 347 So.2d 503 (La. 1977), properly disposed of both contentions set forth by Petitioner. In this regard, this Court is referred to the detailed discussion of the decisions in said Louisiana litigation set forth in the ruling by Judge Scott, of the District Court below, in the Lee II decision. (Petitioner's Appendix B, pages 1-4). Any claim for cancellation of the Lease Agreement for lack of consideration was at the time of the Louisiana litigation held to have been long prescribed under either Louisiana Civil Code Article 3542 or Article 2221, providing for prescriptive periods of five or ten years, respectively. The claim of the existence of a potestative condition under Louisiana law was rejected by the Louisiana Courts. Further, the District Court below, in Lee II, (Petitioner's Appendix B, pages 6 and 7) further disposed of these contentions of lack of serious consideration and the existence of a potestative condition.

Petitioner continues to argue the applicability of the decision in the *L. L. Brewton Co.* case, supra, as he has for some twelve years, both as Counsel for Lee Lumber Co., Ltd. in Lee I and Lee II, and as Plaintiff in Lee III and as Petitioner herein in Lee IV, conveniently disregarding the obvious fact that no question of prescription was ever raised or ever entered into the consideration of the Court in that case.

The District Court below did not reach a "contrary conclusion" in either Lee II, Lee III, or Lee IV. Application by the Court of Louisiana laws of liberative prescription went to the heart of the matters in Lee II and Lee III and, subsequently, in Lee IV, the Louisiana and Federal doctrines of res judicata.

The Courts below have, in fact, not attempted to apply the holdings of *Brewton* in this litigation. The obvious reason that said decision has not been applied to this litigation is the clear and indisputable difference in the factual situations

involved and the recognized inapplicability of the *Brewton* decision to the factual and legal circumstances involved in this and earlier litigation of this controversy between these parties.

In his discussion of Lee I (pages 6 and 7), Petitioner knowingly misstates the actual holdings of the Louisiana Courts. This Court is respectfully referred to the reported decisions in said litigation, supra, and to the citations hereinabove to the note and discussion of said State Court decision by the District Court below in Lee II (Petitioner's Appendix B, pages 1-4).

In discussing Lee II, Petitioner states that said lawsuit was brought in the District Court below on certain "underlying causes of action", among which were the action to quiet title and the possessory action, and states that same had not prescribed. He further states that International Paper Company, respondent herein, was granted Summary Judgment by the District Court in Lee II solely on the basis of prescription of the action of nullity or rescission. This statement is, at the very best, intentionally misleading.

The Court is respectfully referred to the District Court's decision in Lee II (Appendix B, pages 4-10) for the true reasoning and holding of the District Court. It will be found that Lee Lumber Co., Ltd. urged the action to quiet title and the possessory action, among others, stating in its Complaint that all of said underlying causes of action were based on the invalidity of the Lease Agreement. In support of its contentions at that time, Lee cited and argued a number of the same decisions and authorities which Petitioner now urges to this Court.

In outlining the history of Lee III, Petitioner states that the District Court below held that the possessory action urged

therein was stated and had not prescribed. This is not simply an erroneous conclusion, it is a knowingly false statement. The District Court ruled that International Paper Company is possessing under a valid Lease Agreement and that, therefore, there being no disturbance, the possessory action was not a proper action before the Court (Petitioner's Appendix C, pages 5 and 6). In that lawsuit, this Petitioner, by personal affidavit filed with the District Court, had affirmed that his only cause of action urged was the possessory action. This Court is respectfully requested to note that the Ruling of the District Court in Lee III did state that the Summary Judgment granted International in Lee II was dispositive of the entire claim of Lee Lumber Co., Ltd. and this Petitioner. The District Court (Petitioner's Appendix C, page 6, in footnote 11) indicated that "assuming arguendo that the lease was void", the time for the bringing of an action would be a period of one year following any "disturbance" established. However, the Lease Agreement is not void, but to the contrary, its validity was again reiterated in said Ruling.

As regards Petitioner's discussion of Lee IV, it will be found that Judge Scott, in the District Court below, did rely upon and cite Lee I, Lee II and Lee III as being dispositive of Petitioner's claim or contention of an action to quiet title, and held the Judgments therein res judicata as to all claims and contentions of Petitioner in Lee IV. The Fifth Circuit Court of Appeals, in affirming the decision of the District Court, stated that the precise issue in that appeal by Petitioner had been decided against Lee Lumber Co., Ltd. in Lee II in 1980, stating that said determination was clearly res judicata as to this present claim of Petitioner in Lee IV (Petitioner's Appendix D, page 10), but the Fifth Circuit did in fact review all of the prior litigation between the parties involved in this same controversy (Petitioner's Appendix D, page 9).

It will be of particular interest to this Court to note that much of the language, material and contentions now set forth by Petitioner in his Statement of the Case in his Petition now before the Court is repetitious, on occasion almost verbatim, of that set forth by Petitioner in his Statement of the Case in his Petition for Certiorari filed with this Court in Lee III (No. 83-1918, October term 1983) even to misleading and/or knowingly false statements. Particularly, materials and contentions having to do with the history of past and current litigation of this controversy between these same parties and in connection with the *Brewton* decision have been repeated in great part.

SUMMARY OF ARGUMENT

Respondent would at the outset submit to this Honorable Court as strongly as possible that it views this Petition for Certiorari as frivolous. Moreover, Respondent has always viewed Lee II as unnecessary, as all claims of Lee Lumber Co., Ltd. had been completely and finally decided in the litigation before the Louisiana Courts. Lee III was and is viewed by Respondent as an abuse by this Petitioner of the judicial process and as vexatious and harassing litigation. The filing by Petitioner of the present lawsuit, Lee IV, in view of the prudent legal analysis and approach required by the facts, circumstances and history of this litigation, can only be characterized as a further abuse of the judicial process and very pointedly unnecessary, vexatious and harassing, with no reasonable expectation of success.

Although denying actual sanctions, the District Court below agreed (Petitioner's Appendix D, page 4), stating that valuable time and money has been wasted and an unnecessary burden placed upon the Court by this Petitioner's persistence in relitigating this same dispute. It warned Petitioner that any further attempt to relitigate same before that Court would be at the risk of imposition upon him of whatever sanctions might be deemed appropriate by the Court. The Fifth Circuit (Petitioner's Appendix D, page 10) found from the record that the precise issue appealed from the District Court by this Petitioner to the Fifth Circuit had already been decided, contrary to the claims and interests of Lee and Petitioner, in earlier litigation, that Petitioner had no colorable argument under Louisiana law to support his theory that Lee IV is not precluded by the Judgment rendered in Lee II, that the appeal to said Court by Petitioner was completely meritless and granted sanctions to Respondent, in the form of attorneys' fees and costs.

In this context, and in light of this clear message to Petitioner by the District Court and Fifth Circuit below, Respondent submits that the filing in this Court by Petitioner of this Petition for Certiorari justifies imposition of additional sanctions by this Honorable Court.

Each of the reasons relied on by Petitioner in seeking a Writ of Certiorari is erroneous and facetious. Each is predicated upon either an erroneous conception or conclusion as to past and present factual and legal circumstances involved in this lawsuit, or is based upon attempts to erroneously apply misconceived legal principles to factual situations which do not exist in this lawsuit.

For the convenience of the Court, Respondent will below treat each of these stated reasons of Petitioner separately, captioned and in the same order as presented in the Petition.

1. Res Judicata and Prescription.

"Res Judicata" has been defined as a salutary doctrine of repose, that gives conclusive finality to a final, valid judgment. It is a doctrine which rests upon considerations of economy of judicial time and public policy favoring the establishment of certainty in legal relations. The rule or doctrine interposes an absolute bar to further litigation of the same cause of action between the same parties or their privies. Its salutary principle is founded upon the generally recognized policy that there must be some end to litigation and that when one appears in Court to present his case, is fully heard, and the contested issue is decided against him, he may not later renew the litigation in another court. The judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties, *Cromwell v. County of Sac*, (1877) 94 U.S. 351, 24 L.Ed. 195; *Lawlor v. National Screen Service Corp.*, (1955) 349 U.S. 322, 326, 75 S.Ct. 865,

99 L.Ed. 1122. The doctrine prevents an encore and "reflects the refusal of law to tolerate needless litigation", *Angel v. Bullington*, (1947) 330 U.S. 183, 192-1933, 67 S.Ct. 657, 91 L.Ed. 832.

The Federal and Louisiana rules are almost identical, as regards the points of reference of each, and quite clearly are based upon the same legal concept. The Louisiana doctrine, sometimes referred to by the Federal Courts as "judicial estoppel", has long been recognized by the Fifth Circuit, which has earlier observed that same is given a less rigid construction than that of res judicata, *Friedenthal v. General Insurance Company of America*, (1968) 395 F.2d 202. Same being subject to a less rigid construction actually results in its being *less permissive* of relitigation, contrary to Petitioner's position in this regard.

The Ruling of the District Court below in this lawsuit (Petitioner's Appendix D, pages 1-7) sets forth a very good analysis by Judge Scott of the Louisiana requirements of res judicata. The "thing demanded", the "cause of action" on which the demand is founded and the identity of the parties to the lawsuit were found by the District Court to be the same in Lee IV as in Lee I, Lee II, and Lee III. The Fifth Circuit (Petitioner's Appendix D, pages 8-10) affirmed the Judgment of the District Court, particularly pointing out that Petitioner had in this action (Lee IV) characterized his lawsuit as one to quiet title and, because recovery on this theory was advanced by Lee Lumber Co., Ltd. in Lee II – and rejected by the Court – the District Court correctly dismissed Lee IV on grounds of res adjudicata.

Respondent submits that the authorities cited by Petitioner in support of his argument of the inapplicability of res adjudicata herein are of no help to Petitioner. In this lawsuit, Petitioner's cause of action had already been passed upon and

adjudged, in favor of respondent and against Petitioner, in the various lawsuits previously tried before the Louisiana and Federal Courts between these parties.

Petitioner would have this Court believe that the District Court in Lee II "rejected" the claim of Lee Lumber Co., Ltd. that it therein "stated the action to quiet title" by characterizing same as an action to rescind or nullify a lease, thereby holding that no other actions were stated. This approach is intentionally misleading. This Court is again respectfully referred to the Ruling of the District Court in Lee II (Petitioner's Appendix B, pages 4 and 5) wherein the District Court sets forth and identifies the "underlying causes of action" alleged in said lawsuit by Lee, including the action to quiet title, and specifically notes that the Complaint therein states that all of said underlying causes of action are based on the alleged invalidity of the Lease Agreement. Holding that the establishment of the invalidity of the lease was necessarily a prerequisite to the maintaining of the "underlying causes of action", the District Court held that all of Lee's alleged causes for seeking the avoiding or invalidation of the Lease Agreement had prescribed and thereby effectively disposed of all alleged causes of action, principal or underlying. These factual and legal circumstances, as well as the effect upon the parties of the various Rulings and Judgments in the history of this litigation, are apparent from the record.

Again, Petitioner goes to great length to attempt to present to this Court as factual his very complicated misinterpretation of the facts and law involved herein, be these misinterpretations innocent or intentional.

Petitioner (page 15) proposes to this Court that the action to quiet title has continually accrued anew since the decision in Lee II and, for this reason, would not be barred said decision. This Court is referred to the discussion of this

theory, advanced by Lee Lumber Co., Ltd. in Lee II, in the opinion of the District Court therein (Petitioner's Appendix B, pages 8 and 9). These claims of Lee, and now of Petitioner, have also been previously adjudged in the history of this litigation in favor of Respondent and against Lee and Petitioner. It will be noted that some of the same authorities now advanced by Petitioner for this theory were advanced by Lee in Lee II.

One of the more esoterical theories advanced by this Petitioner, as Counsel for Lee in Lee II and now on his own behalf, is that under which he would rely upon Louisiana Civil Code of Procedure Article 424, in using as a defense a prescribed obligation, or the provisions of Louisiana Civil Code Article 3032 (formerly Articles 2221 and 3542), which provides that nullity may be raised as a defense against an action on a contract, even after the prescription of the action for annulment. Judge Scott's District Court decision in Lee II (Petitioner's Appendix B, pages 7 and 8) deals with and rejects this proposed theory and scenario in no uncertain terms. The District Court therein found this argument and theory unpersuasive, not supported by Louisiana jurisprudence and, more fundamentally, "because its acceptance would result in an emasculation of the Louisiana prescription laws in the area of nullity and rescission".

Respondent submits that the Ruling of the District Court below in Lee IV, the granting of Summary Judgment in favor of Respondent and the affirmation thereof by the Fifth Circuit Court of Appeals are all eminently correct.

2. Imposition of Attorney's Fees

This Petitioner has been personally and directly involved with all aspects of prior litigation of this controversy between these same parties, through the Courts of the State of Louisiana

and through the Federal Courts, since the instigation of the first lawsuit in 1973, first as Counsel for Lee Lumber Co., Ltd., then as Plaintiff in Lee III and Lee IV and now as Petitioner herein. He is fully cognizant of the holdings and effect of prior Judgments rendered by the Louisiana and Federal Courts. Any misconception as to the finality and effectiveness of said prior Judgments, under which he may now be proceeding, is in no way due to an honest misunderstanding on his part, but due simply to his refusal to accept the fact of said finality and conclusiveness. His bringing of Lee IV against Respondent, in light of these prior holdings and Judgments, the factual and legal circumstances of the present relationship of the parties to this lawsuit and his personal familiarity with and knowledge of same, with no reasonable expectation of success, can only be viewed as vexatious and harassing and as unreasonably multiplying the proceedings in this controversy and unreasonably increasing the cost of Respondent. His appeal of the Ruling and Judgment of the District Court, and particularly in light of Judge Scott's admonitions set forth therein (Petitioner's Appendix D, page 10), with no colorable argument under Louisiana law to support his theory of appeal, was completely meritless. The Fifth Circuit found said appeal to be without colorable argument and meritless and granted Respondent's motion for attorney's fees and costs against this Petitioner for pressing a frivolous appeal.

Petitioner would have this Court believe that the Fifth Circuit granted these sanctions against him in an atmosphere completely devoid of any evidence or basis to support said action. A reading of the affirming Opinion of the Fifth Circuit (Petitioner's Appendix D, pages 8-10) quite clearly shows that the Fifth Circuit very carefully reviewed the entire history of this litigation, the findings and effect of the various Judgments rendered by both the State and Federal Courts and the obvious factual and legal circumstances in which the

parties to this lawsuit found themselves at the time of the bringing of Lee IV by Petitioner and at the time of the appeal of the District Court's decision therein to the Fifth Circuit Court. The affidavits of other attorneys and former law school personnel filed by Petitioner in support of his position, and alluded to in his Petition, were nothing more or less than personal opinions of parties supportive of Petitioner's position. Whatever weight may have been given to same by the Fifth Circuit, that Court relied upon the findings of fact and application of appropriate codal and/or statutory law by Courts of competent jurisdiction, as established by the records of the various phases of the history of this litigation, and found that said appeal to it of the Ruling and Judgment of the District Court was in fact frivolous, unsupported by colorable argument under Louisiana law and meritless. In the exercise of its discretion, sanctions were granted in favor of Respondent and against Petitioner for pressing said frivolous appeal.

Respondent submits that the question of granting or refusing Petitioner a hearing on the question of sanctions and attorney's fees below was a matter properly within the discretion of the Fifth Circuit Court of Appeals. It cannot be said that a denial of such requested hearing was a denial of due process under the Fifth and Fourteenth Amendments to the Constitution. The Respondent submits that Petitioner's real dissatisfaction is with the decision reached by the Fifth Circuit after considering all evidence, facts and circumstances, not with any alleged failure of the Fifth Circuit to consider same.

The Federal Rules of Civil Procedure, the Federal Rules of Appellate Procedure and 28 U.S.C. Section 1927 provide for specific responsibilities and obligations of attorneys in presenting pleadings, motions and other papers to the Federal Courts and for imposition of sanctions and penalties against

attorneys for abandonment or violation of these responsibilities (F.R.C.P., Rule 11; F.R.A.P., Rule 38; 28 U.S.C. Sec. 1927).

Rule 38, Federal Rules of Appellate Procedure, provides for imposition of sanctions by an Appellate Court, where it shall determine that an appeal is frivolous. In *Malhoit v. Southern California Retail Clerks' Union* (9th Cir.-1984), 735 F.2d 1133, the Court, citing both 28 U.S.C. Sec. 1927 and The American Bar Association's Code of Professional Responsibility, awarded sanctions in the form of attorney's fees and costs and set forth the following as a measure or test of the frivolous nature of an appeal, to wit:

> "*** An appeal is frivolous if the result is obvious or if the claims of error are wholly without merit. *DeWitt v. Western Pacific Railroad Co.*, 719 F.2d 1448, 1451 (9th Cir. 1983)."

It is submitted that the grant to Respondent of sanctions against this Petitioner, in the form of attorney's fees and costs, for his lodging and pressing of the frivolous appeal, was properly made, amply supported by evidence supplied by the several Rulings and Judgments of Courts of competent jurisdiction, had throughout the history of this litigation, was completely within the discretion of the Fifth Circuit and eminently correct.

CONCLUSION

A review of the Writ of Certiorari is not a matter of right, but of judicial discretion, and will be granted only where there are special and important reasons therefor. The character of reasons which will be considered by this Court is set forth in its Rule 17.

It is respectfully submitted that no reasons have been shown in these proceedings to support this request by Petitioner for the issuance by this Court of a Writ of Certiorari.

Respondent submits that the Petition for Certiorari is entirely without merit and respectfully requests that same be denied.

All of the above and foregoing is thus respectfully submitted.

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Attorneys for Respondent

CERTIFICATE OF SERVICE

I, David I. Garrett, Jr., one of the attorneys for International Paper Company, Respondent in these proceedings, being a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 2nd day of June, 1986, copies of this Opposition to the Petition for Certiorari, with included or accompanying brief and argument, were mailed in duly addressed envelopes, with postage prepaid, to:

Robert B. Eubank
Petitioner
Suite 203
15 Office Park Circle
Birmingham, Alabama 35223

Richard L. Crowell
Crowell, Owens & Tudor
Counsel for Lee Lumber Company, Ltd.
P. O. Box 330
Guaranty Bank & Trust Company Building
Alexandria, Louisiana 71309

I further certify that all parties required to be served have been served.

David I. Garrett, Jr. pmm

David I. Garrett, Jr.